FILED
FEB 28 2005
OFFICE OF THE CLERK

No. 04-5928

In The
Supreme Court of the United States

JOSE ERNESTO MEDELLIN,

Petitioner,

v.

DOUG DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF LIBERTY LEGAL INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

KELLY SHACKELFORD
Counsel of Record
HIRAM S. SASSER, III
JONATHAN M. SAENZ
LIBERTY LEGAL INSTITUTE
903 E. 18th, Ste. 230
Plano, TX 75074
(972) 423-3131

Counsel for Amicus Curiae

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF THE ARGUMENT	2
ARGUMENT	3
I. THE *AVENA* DECISION DOES NOT BIND THIS COURT TO FASHION AN EXTRAORDINARY REMEDY FOR AN INDIVIDUAL	3
A. THE VIENNA CONVENTION DOES NOT PROVIDE FOR AN EXTRAORDINARY REMEDY FOR AN INDIVIDUAL	4
B. THE *AVENA* DECISION FALLS SHORT OF MANDATING AN EXTRAORDINARY REMEDY FOR INDIVIDUALS	5
C. IT IS UNNECESSARY FOR THIS COURT TO FASHION AN EXTRAORDINARY INDIVIDUAL REMEDY FOR AN ARTICLE 36 VIOLATION	6
II. THE PROCEDURAL DEFAULT RULE IS NOT AN ABSOLUTE BAR TO COURTS REVIEWING VIENNA CONVENTION VIOLATIONS	8
A. THE PROCEDURAL DEFAULT RULE CARRIES WITH IT A PACKAGE OF EXCEPTIONS DESIGNED TO PREVENT AN INJUSTICE	8

TABLE OF CONTENTS – Continued

Page

B. THIS COURT, IN REVIEWING AND RECONSIDERING THIS CASE, NEEDS ONLY TO CONSIDER WHETHER THE ARTICLE 36 VIOLATION FALLS WITHIN ONE OF THE PRE-ESTABLISHED EXCEPTIONS TO THE PROCEDURAL DEFAULT RULE AND NEED NOT FASHION AN EXTRAORDINARY REMEDY FOR ANY SUCH VIOLATION 9

III. THIS COURT SHOULD ADOPT A PROCEDURAL RULE OF BIFURCATED ANALYSIS WHEN INVOKING OR RELYING UPON INTERNATIONAL LAW – REQUIRING THE COURT TO FIRST ANALYZE ANY ISSUE USING PURELY DOMESTIC LEGAL SOURCES AND THEN, ONLY IF SUCH DOMESTIC LEGAL SOURCES ARE FOUND INADEQUATE, RESORTING TO INTERNATIONAL LEGAL RESOURCES 10

A. COURTS AND PRACITITIONERS NEED SPECIFIC GUIDANCE FROM THIS COURT REGARDING THE ROLE OF INTERNATIONAL LAW IN OUR DOMESTIC JURISPRUDENCE 10

B. A BIFURCATED ANLAYSIS APPROACH IS REQUIRED UNDER CUSTOMARY INTERNATIONAL LAW 12

CONCLUSION 13

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Coleman v. Thompson, 501 U.S. 722 (1991) 9

Grutter v. Bollinger, 539 U.S. 306 (2003) 11

Lawrence v. Texas, 539 U.S. 558 (2003) 11

Miranda v. Arizona, 384 U.S. 436 (1966) 5, 6

Murray v. Carrier, 477 U.S. 478 (1986) 9

Olympic Airways v. Husain, 540 U.S. 644 (2004) 11

The Paquette Habana, 175 U.S. 677 (1900) 12

Wainwright v. Sykes, 433 U.S. 72 (1977) 9

INTERNATIONAL CASES

Ambatielos Case (Greece v. U.K.), 1951, 12 R.Int'l Arb. Awards 91 13

Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 1 (Mar. 31) ..... *passim*

Barcelona Traction, Light and Power Co. (Belgium v. Spain), 1970 I.C.J. 3 12

Interhandel (Switz.v. U.S.), 1959 I.C.J. Rep. 5, 27 (Mar. 21) 12

STATUTE

42 U.S.C. § 1983 4

TABLE OF AUTHORITIES – Continued

Page

TREATIES

Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, *opened for signature* April 24, 1963, 21 U.S.T., 325, 596 U.N.T.S. 487 ..... 4, 5

Statute of the International Court of Justice, *opened for signature* June 26, 1945, 59 Stat. 1031 4

United Nations Charter, *opened for signature* June 26, 1945, 59 Stat. 1031 6

Vienna Convention on Consular Relations, *opened for signature*, April 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 ..... 3, 4

OTHER AUTHORITIES

RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1987) 6

U.S. Dep't of State, *U.S. Terminates Acceptance of ICJ Compulsory jurisdiction*, DEP'T OF STATE BULL., Jan. 1986, at 67 (letter from U.S. Secretary of State to U.N. Secretary-General, Oct. 7, 1985) 6

INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae Liberty Legal Institute is a non-profit law firm dedicated to the preservation of first amendment rights and religious freedom. In its commitment to the protection of religious liberty of all faiths, the Institute represents religious institutions and individuals across the country. The Liberty Legal Institute is increasingly aware that international law is playing a role in decisions by the United States Supreme Court in a diverse array of issues, including issues regarding domestic public policy. While international law has played a distinct role in our jurisprudence since the formation of this Nation, it is important to recognize that our domestic jurisprudence superbly serves this Nation, its citizens and visiting foreign nationals.

The customary international rule of exhaustion of local remedies compels federal courts to first exhaust all domestic legal analysis before engaging in the application of foreign sources of law. *Amicus* believes very strongly that our national sovereignty depends upon federal courts restraining themselves to bifurcate analysis in all cases where international law may be seen as providing helpful guidance. Such bifurcation of analysis protects the integrity of our judicial system and highlights exactly how the Court is employing international law. While the social utility of relying upon international sources in various areas of the law, such as domestic constitutional jurisprudence, remains

---

[1] The parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of this Court. Pursuant to this Court's Rule 37.6, none of the counsel for the parties authored this brief in whole or in part and no one other than *amicus* or its counsel contributed money or services to the preparation and submission of this brief.

controversial, it is the position of *amicus* that this Court should at least put lower courts and practitioners on notice of exactly how international law may be applied. Bifurcation will ensure the consistency the legal community has come to expect from the judiciary while not foreclosing the application of international law in appropriate circumstances.

SUMMARY OF THE ARGUMENT

The Vienna Convention on Consular Relations does not provide for an individual remedy, but merely provides for remedies between nation-states. Because the Vienna Convention itself does not create an individual remedy and the International Court of Justice does not provide standing to individuals, the *Avena* court fell far short of requiring any specific extraordinary remedy for an individual. This Court is left to apply domestic law of its choosing to satisfy the "review and reconsideration" recommendation in *Avena*.

If this Court chooses to review and reconsider the conviction and sentence of Petitioner in light of the Article 36 violation, current domestic jurisprudence provides an adequate remedy. The exceptions to the procedural default rule give this Court the avenue to consider the Article 36 violation without resorting to reliance upon a decision by an international tribunal.

To avoid unnecessary reliance upon international sources for authority and comply with the binding international customary rule of exhaustion of municipal remedies, this Court should adopt a bifurcated analysis approach.

The Court should begin by analyzing any issue presented using purely domestic sources and legal analysis. Only if an adequate resolution cannot be found in domestic legal analysis should the Court turn to international sources. Using this procedural device, this Court could balance the requirement that domestic legal analysis be final before international sources are sought and the desire by some members of the Court to look toward international sources for guidance when necessitated. Such a balance creates consistency within our domestic judicial system and ensures that purely domestic issues are resolved using purely domestic legal analysis.

ARGUMENT

I. The *Avena* decision does not bind this Court to fashion an extraordinary individual remedy for Petitioner.

Public international law is the legal relationship undertaken between nation-states. States remain sovereign and choose the manner in which they are bound by international law, save *jus cogens*, a limited class of legal obligations states may not avoid. When states undertake to form an agreement, or treaty, each state incurs obligations to the other and remedies for a breach or material breach of that agreement are fashioned. As is the case with the Vienna Convention on Consular Relations, *opened for signature* April 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261, treaties between sovereigns are almost always obligations owed state to state, not state to individual or individual to state.

A. The Vienna Convention does not provide for an extraordinary remedy for an individual.

The Vienna Convention does not provide for an extraordinary individual remedy. This is not to say that the Vienna Convention is not self-executing under the domestic doctrine of self-execution. However, whether the Vienna Convention requires further implementing legislation to be the "law of the land" under the Supremacy Clause misses the point. Whether or not such implementing legislation is necessary, the Vienna Convention itself provides no remedy for any breach that an individual may invoke. The only remedy for a violation of the Vienna Convention is presented in the Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, *opened for signature* April 24, 1963, 21 U.S.T. 325, 596 U.N.T.S. 487. This remedy, of course, only applies to states.[2] Thus, the Vienna Convention may confer rights to individuals, but it does not itself create a remedy for that right.[3]

The Vienna Convention itself, within the four corners of the document, specifically reads in the preamble, "[r]ealizing that the purpose of such privileges and immunities is not to benefit individuals but to ensure the

[2] The Optional Protocol requires ratifying states to submit their cause before the International Court of Justice, which only allows states to appear as parties. *See* Statute of the International Court of Justice, art. 34(1), *opened for signature* June 26, 1945, 59 Stat. 1031.

[3] Just as 42 U.S.C. § 1983 provides a judicial vehicle upon which rides constitutional claims so that a remedy may be fashioned, so too must the Vienna Convention ride on some legislation to fashion a remedy.

efficient performance of functions by consular posts on behalf of their respective States." Thus, the Vienna Convention alone does not provide a remedy for a violation of any particular individual's rights, save the Optional Protocol. Only if a state ratifies the Optional Protocol may it, as the state, pursue a remedy against another ratifying state at the International Court of Justice.

B. The *Avena* decision falls short of mandating an extraordinary remedy for individuals.

Mexico availed itself of the only remedy available under the Vienna Convention, by seeking an opinion from the International Court of Justice. The decision in *Avena and Other Mexican Nationals* (Mex. v. U.S.), 2004 I.C.J. 1 (Mar. 31) (hereinafter *Avena*) fell far short of Mexico's desire in its fourth submission to full reparation in the form of *restitutio in integrum*. *See id.* at ¶¶ 116-125. First and foremost, the International Court of Justice specifically did not adopt Mexico's contention that the rights in the Vienna Convention rise to the level of "human rights" and "neither the text nor the object and purpose of the Convention, nor any indication in the *travaux preparatoires*, support the conclusion." *Id.* at ¶ 124. Thus, the International Court of Justice specifically declined to fashion a specific extraordinary remedy for individuals, but rather left it "for the courts of the United States to examine the facts, and in particular the prejudice and its causes, taking account of the violation of the rights set forth in the Convention."[4] *Id.* at ¶ 122. Such "review and

[4] Contrast this with the requirement for the famous *Miranda* warnings whereby a conviction based upon a confession obtained in

(Continued on following page)

reconsideration" in light of the Article 36 violations is all that is suggested by the International Court of Justice.[5] This "review and reconsideration" decision by the ICJ is not inconsistent with already established judicial practice in the United States regarding the procedural default rule.

C. It is unnecessary for this Court to fashion an extraordinary individual remedy for an Article 36 violation.

Even though Petitioner's right does not rise to the level of a "human right," amicus assumes for purposes of this brief that Petitioner nevertheless suffered the impingement of a right for which the United States as a sovereign is ultimately responsible. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED

violation of *Miranda v. Arizona*, 384 U.S. 436 (1966) must be overturned. The *Avena* decision explicitly rejects the notion that the judicial proceedings were so tainted by the Article 36 violation that the convictions and sentences must be overturned. Such a finding by the *Avena* court would certainly require a remedy in the form of *restitutio in integrum*, as Mexico argued. However, the *Avena* court wholly rejected Mexico's submission in that regard. *See Avena*, ¶ 125.

[5] It is important to note that the International Court of Justice is not a link in the judicial chain of the system of justice for the United States. Indeed, the United States has taken a position hostile to the International Court by withdrawing from the voluntary jurisdiction of the court. *See* U.S. Dep't of State, *U.S. Terminates Acceptance of ICJ Compulsory jurisdiction*, DEP'T OF STATE BULL., Jan. 1986, at 67 (letter from U.S. Secretary of State to U.N. Secretary-General, Oct. 7, 1985). There is no *stare decisis* for the International Court and all of its opinions have no binding force beyond the immediate matter and do not create required precedent. *See* Statute of the International Court of Justice, art. 59. In fact, it is clear that enforcement of decisions of the International Court of Justice falls to the Security Council, not internal judicial systems of various states. *See* United Nations Charter, *opened for signature* June 26, 1945, art. 94(2), 59 Stat. 1031.

STATES § 711(b) (1987). For such a violation, this Court and the International Court of Justice may look to four sources to fashion a remedy. *Id.* at § 713(2).

First, a tribunal may look to an "international agreement between the person's state of nationality and the state responsible for the injury." *Id.* at § 713(2)(a). The Vienna Convention is such an agreement and as discussed above, the Convention does not provide for an individual remedy as other treaties may provide. That is why the ICJ did not attempt to mandate a specific remedy and instead recommended "review and reconsideration," because no such remedy exists under international law.

Second, a tribunal may look to a remedy provided by "the law of another state." *Id.* at 713(b)(c). Petitioner has not advanced that the law of another state provides any specific individual remedy for an Article 36 violation and neither did the ICJ.

Third, a tribunal may look to a remedy provided by "agreement between the person injured and the state responsible for the injury." *Id.* at § 713(2)(d). There is no such agreement present in this case.

Finally, a tribunal may look to "the law of the state responsible for the injury." *Id.* at 713(2)(b). Although the *Avena* court did not specifically state as much, it appears that the ICJ's opinion relies exclusively upon this source for a remedy. The *Avena* court merely recommended the United States undertake "review and reconsideration of the convictions and sentences." *Avena*, at ¶ 153. In addition,

the ICJ left it to the United States to decide under its own domestic law the effect of the Article 36 violation upon the conviction and sentence of petitioner.[6] Thus, it is for this Court to determine under our own package of domestic rules the measure of the effect of any Article 36 violation upon the conviction and sentence of petitioner.

Petitioner, Mexico and the ICJ seem to agree that the procedural default rule, a purely domestic rule, prohibits such review and reconsideration. It clearly does not. This Court, in determining whether the Article 36 violation before it in this case rises to the level that requires the invocation of one of the pre-existing exceptions to the procedural default rule, is conducting the "review and reconsideration" recommended by the decision in *Avena*.

II. The procedural default rule is not an absolute bar to courts reviewing Vienna Convention violations.

A. The procedural default rule carries with it a package of exceptions designed to prevent an injustice.

This Court made it "explicit" that "[i]n all cases in which a state prisoner has defaulted his federal claims in state court . . . federal habeas review of the claims is

[6] "The Court affirms that the case before it concerns Article 36 of the Vienna Convention and not the correctness as such of any conviction or sentencing. The question of whether the violations of Article 36, paragraph 1, are to be regarded as having, in the causal sequence of events, ultimately led to convictions and severe penalties ***is an integral part of criminal proceedings before the courts of the United States and is for them to determine in the process of review and reconsideration.***" *Avena*, at ¶ 122. (emphasis added)

barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman v. Thompson*, 501 U.S. 722, 750 (1991); *see also Wainwright v. Sykes*, 433 U.S. 72, 87 (1977).[7] The purpose of these two exceptions is clear: they are designed to ensure that procedural rules do not subvert our overarching desire to achieve real justice. This Court has clearly applicable domestic law at its disposal to adjudicate this case without resorting to international law.

B. This Court, in reviewing and reconsidering this case, needs only to consider whether the Article 36 violation falls within one of the pre-established exceptions to the procedural default rule and need not fashion an extraordinary remedy for any such violation.

Petitioner attempts to put this Court in an awkward position. Petitioner's argument is focused around the contention that the *Avena* decision "supplies the rule of decision in this case." Petitioner's brief, p. 41. There is a false premise built into this argument: if the Court desires to give effect to the suggestion of review and reconsideration by the *Avena* court, then it must discard the procedural default rule entirely in order to properly review and reconsider the Article 36 violation. This is untrue. This Court may analyze this case in light of the exceptions to

[7] In addition, the default rule does not apply when the alleged constitutional violation results in the conviction of the innocent. *See Murray v. Carrier*, 477 U.S. 478 (1986).

the procedural default rule to determine whether an Article 36 violation rises to the level of a miscarriage of justice or is a cause that gave rise to prejudice in the state court proceedings.[8] Such a "review and reconsideration" is grounded in domestic law and does not force this Court to bow to the will of an external body.

III. This Court should adopt a procedural rule of bifurcated analysis when invoking or relying upon international law – requiring the Court to first analyze any issue using purely domestic legal sources and then, only if such domestic legal sources are found inadequate, resorting to international legal resources.

A. Courts and practitioners need specific guidance from this Court regarding the role of international law in our domestic jurisprudence.

There is much confusion when this Court engages in domestic legal analysis that is "informed" by international legal sources. This confusion is unnecessary. Whatever the perceived value of international sources, it is incumbent upon this Court to bifurcate its analysis. The Court should first look to see if a question may be answered using

[8] It seems fairly obvious that Petitioner's counsel would seek some remediation for Petitioner's conviction and sentence along all avenues judicially available. The fact that Petitioner did not raise the issue that the Article 36 violation falls within one of the exceptions to the procedural default rule before this Court or below renders the unmentioned quite obvious. It seems from the briefing that the real interests of Petitioner diminish before the all important cause of converting the International Court of Justice into the Supreme Court and reducing the United States Supreme Court to the role of a mere judicial subsidiary.

purely domestic law. Only if domestic law has been completely exhausted should the Court turn to international sources. Such a procedural rule of bifurcated analysis will serve three essential policy purposes.

First, such bifurcated analysis will further the development of a consistent body of law. Jurists and legal professionals will be able to depend on the stability of the law as it is crafted and molded in our domestic legal system. The international legal system, with so many moving parts, does not provide the same level of consistency and predictability. Second, it will curb the fear of so many that international law is being used to replace domestic legal analysis, including our constitutional jurisprudence. In the wake of *Lawrence v. Texas*, 539 U.S. 558 (2003) and *Grutter v. Bollinger*, 539 U.S. 306 (2003), it is important for this Court to demonstrate that domestic legal analysis may stand on its own foundation. Third, it reserves international law for the real role it plays in our national judicial system. *See, e.g., Olympic Airways v. Husain*, 540 U.S. 644, 658 (2004) (Scalia, J., dissenting) (recognizing this Court's practice of according the judgments of sister signatories to a treaty "great weight").[9]

[9] While some argue it is appropriate for this Court to consider the *Avena* decision in light of its interpretation of the actions of the government officials involved as *violations* of Article 36 of the Vienna Convention, this Court should refrain from reading into that decision a mandate to fashion some new *remedy*. Even the *Avena* decision itself makes clear that the remedy for the individual Mexican nationals is solely within the discretion of the United States judiciary. *See Avena*, ¶ 122.

B. A bifurcated analysis approach is required under customary international law.

The exhaustion of municipal or local remedies is a long standing principle of customary international law. *See Interhandel* (Switz. v. U.S.), 1959 I.C.J. Rep. 5, 27 (Mar. 21) ("The rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law."). The *Avena* decision found that the exhaustion of local remedies was not necessary for Mexico to bring a claim before the International Court of Justice. *See Avena*, at ¶ 40. However, this Court is adjudicating a claim of an individual. As such, the exception to the exhaustion of local remedies for states bringing the claims of their nationals as a claim of the state itself is not available in our federal courts.[10] Exhaustion of local remedies ensures that international law does not unnecessarily take over the domestic law of any state. As customary international law compels this Court to recognize the rule of exhaustion of local remedies as binding,[11] it is important for this Court to adopt a procedural rule that gives effect to that binding international requirement.

"Local remedies" included "the whole system of legal protection, as provided by municipal law," including "the use of procedural facilities which municipal law makes

[10] The finding by the *Avena* court that such an exception to the general rule of exhaustion of local remedies applied is neither new nor novel. International law has consistently recognized the right of a State to bring a claim on behalf of its citizens as a claim of its own before international tribunals. *See, e.g., Barcelona Traction, Light and Power Co.* (Belgium v. Spain) 1970 I.C.J. 3.

[11] *See The Paquete Habana*, 175 U.S. 677, 700 (1900).

available to litigants." *Ambatielos Case* (Greece v. U.K.), 1951, 12 R.Int'l Arb. Awards 91, 120, 122. Thus, this Court should exhaustively analyze every domestic remedy available in any case before resorting to international sources to identify remedies. In the present case, there are purely municipal or domestic remedies already available. In addition, there are no international sources identifying specific individual remedies for Article 36 violations. Plainly, international law compels this Court to decide this case on purely domestic grounds already developed within the jurisprudence of this Nation.

CONCLUSION

The exhaustion of local remedies is required under customary international law. Our domestic system of justice provides such an adequate local remedy – our procedural default rule and its exceptions including consideration of whether there has been a "miscarriage of justice." Each court below satisfied the *Avena* court's recommendation of "review and reconsideration" when they reviewed Petitioner's case. In fact, this Court went even further when it granted certiorari. No further remedy is required under any treaty, custom or the *Avena* decision. Replacing adequate domestic law with international law is unnecessary, unwise, and would actually violate customary international law.

For the foregoing reasons, the Liberty Legal Institute respectfully requests the Court to affirm the opinion of the Court of Appeals.

Respectfully submitted,

KELLY SHACKELFORD
Counsel of Record
HIRAM S. SASSER III
JONATHAN M. SAENZ
LIBERTY LEGAL INSTITUTE
903 E. 18th Ste. 230
Plano, TX 75074
(972) 423-3131

Counsel for Amicus Curiae